UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

IN RE:

JEFFREY DALE PHILLIPS &
CHRISTINA LEE PHILLIPS,

Debtors.
_____/

CASE NO.: 19-30566-KKS
CHAPTER: 7

KEN ARNOLD

Plaintiff,
v.

JEFFREY DALE PHILLIPS &
CHRISTINA LEE PHILLIPS

Defendants.
_____/

ADV. NO.: 19-03009-KKS

ORDER TO SHOW CAUSE PURSUANT TO BANKRUPTCY RULE 7056 (RULE 56(f)) WHY SUMMARY JUDGMENT SHOULD NOT BE ENTERED IN FAVOR OF DEFENDANT, JEFFREY DALE PHILLIPS, AS TO COUNT II OF PLAINTIFF'S AMENDED COMPLAINT

THIS ADVERSARY PROCEEDING is before the Court *sua sponte.* Plaintiff requests a three (3) day trial based on Count II of his Amended Complaint. Having carefully reviewed the pleadings, memoranda, affidavits and other documents filed in support of Count II, and the complaint Plaintiff filed in state court, the Court has determined that no

genuine issues of material fact remain to be decided at trial, and summary judgment is due to be granted in favor of Defendant, Jeffrey Dale Phillips and against Plaintiff on Count II of the Amended Complaint.

Bankruptcy Rule 7056 (Rule 56(f)) Notice of Potential Summary Judgment in favor of Defendant, Jeffrey Dale Phillips, on Count II of the Amended Complaint.

Rule 56(f), Fed. R. Civ. P., applicable in this adversary proceeding by Fed. R. Bankr. P. 7056, codifies a court's authority to *sua sponte* grant summary judgment to a nonmoving party after providing notice and a reasonable time to respond.[1] One court described Rule 56(f) as "largely for the convenience of the court, to save it from proceeding with trials that it can readily see are unnecessary."[2]

The Court has determined, based on the current record, that 1) issue preclusion bars Plaintiff from proceeding on Count II of the Amended Complaint; and 2) even if issue preclusion does not apply, Plaintiff has not provided facts sufficient to prove an essential element of

[1] *Gentry v. Harborage Cottages-Stuart, LLLP,* 654 F.3d 1247, 1261 (11th Cir. 2011); *Jones v. Fulton Cty.*, 446 F. App'x 187, 189 (11th Cir. 2011) ("[A] district court has the power to enter summary judgment *sua sponte* . . . ."); *Hartford Fire Ins. Co. v. Trynex, Inc.,* Case No. 11-cv-13360, 2013 WL 12183610 (E.D. Mich. July 25, 2013).

[2] *Natl. Exch. Bank & Tr. v. Petro-Chem. Sys., Inc.*, No. 11-C-134, 2013 WL 1858621, at *1 (E.D. Wis. May 1, 2013).

the cause of action pled in Count II. For those reasons, the Court has determined that unless Plaintiff can show good cause to the contrary, the Court should award summary judgment in favor of Defendant, Jeffrey Dale Phillips ("Phillips"), and against Plaintiff on Count II of the Amended Complaint. The instant Order to Show Cause provides Plaintiff requisite notice and a reasonable time to respond.[3]

I. RELEVANT PROCEDURAL HISTORY

Plaintiff is proceeding on the remaining Counts of his Amended Complaint: Count II as to Phillips only and Count III as to Phillips and co-Defendant, Christina Lee Phillips.[4] In Count II, Plaintiff originally sought a ruling of nondischargeability of debt against both Defendants pursuant to 11 U.S.C. § 523(a)(6). The Court has denied any relief on Count II against Defendant, Christina Lee Phillips.[5] Accordingly, only Phillips remains a target of Count II.[6] In Count III, Plaintiff seeks denial

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[3] *See Jackson v. Doubleback Transp.,* No. 1:17-00386-KD-B, 2019 WL 1993547 (S.D. Ala., May 6, 2019).

[4] *Amended Complaint for Nondischargeability of Debt,* ECF No. 3 (filed July 17, 2019 and docketed as "First Amended Complaint") ("Amended Complaint"). Defendants filed an Answer. ECF No. 7. Since Defendants' counsel withdrew on February 26, 2020, ECF No. 20, Defendants have been self-represented. The Court previously dismissed Count I with prejudice as to both Defendants, ECF No. 41.

[5] *Order Denying Plaintiff's Motion for Summary Judgment on Issue of Non-Dischargeability*, ECF No. 41.

[6]The Court has denied both of Plaintiff's prior summary judgment motions on Count II as to Phillips. *Id.*; *see also Order Denying Plaintiff's Motion for Partial Summary Judgment on Issue of Non-Dischargeability as to Jeffrey Dale Phillips*, ECF No. 81, p. 6–8.

of both Defendants' discharges pursuant to 11 U.S.C. § 727(a)(2).[7]

Defendants having filed an Answer to the Amended Complaint, this proceeding is at issue. On May 7, 2021, as required by an order of the Court, Plaintiff filed a memorandum and supporting Affidavits and other documents addressing Count II of the Amended Complaint.[8] Phillips has filed nothing in response. This adversary proceeding is not currently set for trial.

II. DISCUSSION

A. Summary Judgment Standard

Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[9] Summary judgment is proper if there is no genuine dispute as to any material fact and a party, generally movant, is entitled to judgment in its favor as a matter of law.[10] In assessing summary judgment motions, the Court must view the evidence

[7] The Court has denied Plaintiff's Motion for Summary Judgment as to Count III without prejudice, so that Count remains viable as to both Defendants. ECF No. 41.
[8] *Plaintiff's Memorandum*, ECF No. 102. Plaintiff gives no indication that he intends to proceed on Count III, so the instant Order pertains only to Count II.
[9] *Abreu v. EB & JB Corp.*, No. 14-23266-civ-Lenard/Goodman, 2015 WL 12570946 at *1 (S.D. Fla. Dec. 8, 2015) (citing and quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (internal quotation marks omitted)).
[10] Fed. R. Civ. P. 56(a) made applicable by Fed. R. Bankr. P. 7056.

in a light most favorable to the non-moving party and must draw all reasonable inferences against the moving party.[11] Facts in dispute cease to be "material" when the plaintiff fails to establish a prima facie case: "[i]n such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[12] In the instant action, Plaintiff is seeking judgment against Phillips, so for purposes of this ruling the Court will view the evidence and draw all reasonable inferences against Plaintiff.

B. Material Undisputed Facts Relevant to Count II[13]

Before filing bankruptcy, Phillips ran and operated Affordable Marine Service ("Affordable Marine"), a sole proprietorship.[14] On September 24, 2015, Plaintiff took his 1993 Hydrotech marine vessel with two Honda 225 HP motors and trailer ("Vessel") to Affordable Marine for service, including installation of electronic and mechanical hardware.[15] After several months Affordable Marine had not completed work on the Vessel. On June 20, 2016, Plaintiff met with Phillips at Affordable

[11] *Chapman v. AI Transport*, 229 F.3d 1012, 1023 (11th Cir. 2000).
[12] *Bennett v. Parker*, 898 F.2d 1530, 1532–33 (11th Cir. 1990) (citations omitted).
[13] For purposes of this ruling, the Court assumes the facts provided by Plaintiff to be true.
[14] ECF No. 41, p. 5.
[15] ECF No. 102, p. 4.

Marine and asked to see the Vessel.[16] Because Affordable Marine was "closing up" for the day, Phillips did not allow Plaintiff to go in and see the Vessel.[17] Plaintiff and Phillips discussed the status of repairs to the Vessel, and Plaintiff apparently left somewhat satisfied.[18] Later the same day, a fire at Affordable Marine destroyed the Vessel.[19]

Plaintiff sued and obtained a Final Judgment against Phillips in state court. A critical undisputed fact that Plaintiff has failed to mention in this proceeding is that the Final Judgment was based on his allegations of negligence in Count I of the complaint he filed against Phillips in state court:

> A fire occurred on June 20, 2016 and destroyed the Vessel. The origin of the fire, which damaged an adjacent vessel, has been determined to be electrical and originated from the vessel owned by Arnold.
>
> . . .
>
> Affordable Marine installed the batteries and electrical panels under the center console of the Vessel. These electrical components and Affordable Marine's workmanship have been determined to be the cause of the fire.
>
> . . .
>
> Defendant [Affordable Marine] breached its duty to Arnold by failure to use a reasonable standard of care and diligence in the installation of the electrical components.

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[16] ECF No. 102, p. 5; *Excerpt of deposition of Plaintiff, Ken Arnold, taken January 19, 2018*, ECF No. 102-7, p. 3.
[17] ECF No. 102-7, p. 3.
[18] *Excerpt from Mr. Phillips' deposition taken January 19, 2018*, ECF No. 102-2, p. 6.
[19] ECF No. 102, p. 5–6. The fire apparently also destroyed another vessel. *Id.* at p. 8.

> *As a result of the negligence of Defendant [Mr. Phillips d/b/a Affordable Marine]*, Arnold has been harmed by the complete loss of the vessel *due to the electrical fire caused by Defendant's poor workmanship and negligence.*[20]

Attached to the state court complaint is a "Cause & Origin Report" issued by the Pensacola Fire Department the day of the fire, that states: "center console area appears to be point of origin."[21]

After a trial, on January 30, 2019 the Circuit Court in and for Escambia County, Florida, entered a Final Judgment for Plaintiff and against Phillips in the amount of $122,922.50 based on those allegations.[22] In that Final Judgment the state court found that Plaintiff had sustained, and proved by competent evidence, the allegations in Count I of his complaint.[23]

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[20] *Complaint*, ¶¶ 4–6, 9–12, *Arnold v. Phillips*, 2016 CA 001646 (Fla. 1st Cir. Ct. Oct. 11, 2016), Filing # 47487640 (emphasis added). The Court takes judicial notice of the state court complaint and attachments. *See* Fed. R. Evid. 201; *Bryant v. Ford,* 967 F.3d 1272, 1275 (11th Cir. 2020) (quoting Fed. R. Evid. 201(b)) ("Rule 201 of the Federal Rules of Evidence permits a court to 'judicially notice a fact that is not subject to reasonable dispute because' it either 'is generally known within the trial court's territorial jurisdiction' or 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'"); *Decision*, *Rob's Automotive, LLC v. Lararz (In re Lararz)*, Ch. 13 No. 19-13756-13, Adv. No. 20-40049-cjf (Bankr. W.D. Wis. Jan. 13, 2021), ECF No. 25 (quoting *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) ("federal courts 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.'").

[21] *Complaint*, Ex. C, *Arnold v. Phillips*, 2016 CA 001646 (Fla. 1st Cir. Ct. Oct. 11, 2016), Filing # 47487640.

[22] ECF No. 3, Ex. A. The Final Judgment also granted Plaintiff the right to possession of the Vessel. *Id.*

[23] *Id.*

C. Issue Preclusion

1. The fact that the fire was caused by negligence is *res judicata*.

Res judicata, also known as claim preclusion, is a doctrine under which "a final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action."[24] One purpose of *res judicata* is to conserve judicial resources; another is to "foster reliance on judicial action by minimizing the possibility of inconsistent decisions."[25] In the Eleventh Circuit, a claim is barred by prior litigation when:

> "(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." If all four elements are met, "the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties not only in respect of every matter which was actually offered and received to sustain the demand, *but also as to every claim which might have been presented.*"[26]

The first three elements of *res judicata* are patently obvious here. The fourth element is also present, although not as facially obvious.

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[24] *Kaiser Aerospace & Elecs. Corp. v. Teledyne Indus., Inc. (In re Piper Aircraft Corp.)*, 244 F.3d 1289, 1296 (11th Cir. 2001).

[25] *Ragsdale v. Rubbermaid, Inc.,* 193 F.3d 1235, 1238 (11th Cir. 1999) (alteration adopted) (citations omitted) (quoting *Montana v. United States*, 440 U.S. 147 (1979)).

[26] *Rivas v. Bank of New York Mellon*, 777 F. App'x. 958, 963 (11th Cir. 2019) (citations omitted) (citing *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.),* 898 F.2d 1544, 1552 (11th Cir. 1990)); *see also In re Piper Aircraft Corp.,* 244 F.3d at 1296.

As to the fourth element of *res judicata*, claims are part of the same cause of action "when they arise out of the same transaction or series of transactions."[27] "In general, 'if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, [then] the two cases are really the same claim or cause of action for purposes of res judicata.'"[28] In order to determine whether two cases involve the same cause of action for *res judicata* purposes, courts are obliged to look at the common nucleus of operative fact and ask what legal theories were used or could have been employed in the first proceeding.[29]

The nucleus of facts here is identical to the facts underlying the state court Final Judgment: Plaintiff delivered the Vessel to Phillips' business for repairs; before Plaintiff verified whether all repairs had been made, the Vessel was destroyed by fire.

The facts Plaintiff proved to the satisfaction of the state court are that 1) "the origin of the fire was determined to be electrical and originated from the Vessel;" 2) "Affordable Marine installed the batteries and electrical panels under the center console of the Vessel;" 3) "[t]hese

[27] *In re Piper Aircraft Corp.*, 244 F.3d at 1297.
[28] *Rivas*, 777 F. App'x at 964 (citing *Ragsdale*, 193 F.3d at 1238).
[29] *Id.*

electrical components and Affordable Marine's workmanship have been determined to be the cause of the fire;" and 4) Plaintiff "has been harmed by the complete loss of the vessel [*sic*] due to the electrical fire caused by Defendant's poor workmanship and negligence."[30]

Here, Plaintiff alleges facts he did not raise in state court in 2016. Ignoring his own allegations of negligence and poor workmanship, in an effort to squeeze his claim into § 523(a)(6) Plaintiff now accuses Phillips of intentionally setting fire to the Vessel.[31]

Res judicata does not preclude any party, including Plaintiff, from pursuing a § 523(a)(6) nondischargeability claim in bankruptcy court because no party has the right to do so until the debtor files bankruptcy.[32] But the fact remains that the underlying cause of Plaintiff's claim against Phillips–negligence–has been determined by a court of competent jurisdiction, so it is only that claim on which Plaintiff may proceed here under 11 U.S.C. § 523(a)(6).[33] Plaintiff's only option is to prove that his negligence claim against Phillips is nondischargeable; that Plaintiff

[30] *Complaint*, ¶¶ 5–6, 12, *Arnold v. Phillips*, 2016 CA 001646 (Fla. 1st Cir. Ct. Oct. 11, 2016), Filing # 47487640.
[31] Negligence is not covered by 11 U.S.C. § 523(a)(6). *Kawaauhau v. Geiger,* 523 U.S. 57 (1998).
[32] *Harry Bradford Barrett Residuary Tr. v. Barrett (In re Barrett)*, 410 B.R. 113, 119 (Bankr. S.D. Fla. 2009) (citing *Brown v. Felsen,* 442 U.S. 127 (1979)).
[33] *In re Piper Aircraft Corp.,* 244 F.3d at 1289.

cannot legally do.

2. Plaintiff is barred by collateral estoppel from relitigating here the same issues litigated previously in state court.

In Florida, "the doctrine of collateral estoppel bars relitigation of the same issues between the same parties in connection with a different cause of action."[34] Bankruptcy courts have exclusive jurisdiction over § 523(a)(6) nondischargeability actions. But this does not mean that every fact bearing on dischargeability must be relitigated and again decided when there has been a prior determination of the same facts by a court of competent jurisdiction.[35] A judgment creditor is not precluded from claiming that a debt resulted from willful and malicious conduct if those elements were not actually litigated and decided in the state court action.[36] But the judgment creditor must actually have facts that show the debt is the result of *the debtor's* conduct. Plaintiff has no such facts.

Kawaauhau v. Geiger is illustrative.[37] There, the plaintiff had been awarded a final judgment against a doctor for medical malpractice.[38]

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[34] *Barrett,* 410 B.R. at 119 (quoting *Topps v. State,* 865 So. 2d 1253, 1255 (Fla. 2004)).
[35] *Murphy v. Rafferty (In re Rafferty)*, Case No. 99-20375-BKC-PGH, Adv. No. 99-2150-BKC-PGH, 1999 WL 33596530, at *2 (Bankr. S.D. Fla. Nov. 30, 1999) (citing *Bear, Stearns & Co. v. Powell (In re Powell)*, 95 B.R. 236, 238 (Bankr. S.D. Fla. 1989), *aff'd* 108 B.R. 343 (S.D. Fla. 1989), *aff'd* 914 F.2d 268 (11th Cir. 1990)).
[36] *Armstrong v. Oslin (In re Oslin)*, 584 B.R. 363, 368 (Bankr. N.D. Okla. 2018).
[37] 523 U.S. at 57.
[38] *Id.* at 59.

After the plaintiff garnished the doctor's wages, the doctor filed bankruptcy.[39] The plaintiff filed an adversary proceeding against the doctor-debtor claiming that the doctor intentionally selected the wrong medical treatment and therefore the malpractice judgment was willful and malicious and nondischargeable under 11 U.S.C. § 523(a)(6).[40] The *Geiger* court held that since the medical malpractice judgment was attributable to negligent or reckless conduct, not willful and malicious conduct, the debt arising from the judgment did not fall within the § 523(a)(6) exception and was dischargeable.[41]

The plaintiff in *Geiger* made no attempt to change the underlying facts litigated in state court. Instead, the plaintiff in *Geiger* put a willful and malicious spin on the same facts.[42] That is not at all what the Plaintiff in this action is attempting. Here, Plaintiff is attempting to completely rewrite the facts to support his nondischargeability claim. This attempt is precisely what the doctrines of *res judicata* and collateral estoppel are designed to prevent.

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[39] *Id.* at 59–60.
[40] *Id.* at 60.
[41] *Id.* at 63–64.
[42] *See, e.g., Kane v. Stewart Tilghman Fox & Bianchi, P.A. (In re Kane),* 755 F.3d 1285 (11th Cir. 2014).

D. Regardless of *res judicata* or collateral estoppel, the undisputed material facts presented by Plaintiff, taken as true, are insufficient to prove that Phillips set the fire that destroyed the Vessel.

"A debtor is responsible for a 'willful' injury when he or she commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury."[43] None of the facts or evidence on which Plaintiff intends to rely at a trial show that Phillips committed an intentional act:

a) Plaintiff delivered the Vessel to Phillips along with certain marine electronics; Phillips charged Plaintiff for installing the marine electronics; a fire occurred on June 20, 2016 and destroyed the Vessel.[44]

b) The "red gas tank" was not on the Vessel at the time of the fire, nor was the hose connecting it to the Vessel; Phillips testified that the Garmin GPS map system was on the Vessel; Phillips did not install any of the marine electronics on the Vessel, but believes his brother may have; Plaintiff and Phillips had a "friendly" conversation at approximately 5:00 p.m. the day of the fire about when the Vessel should be ready; Plaintiff was pleased to learn that the work on the Vessel was "near completion;" Phillips locked the premises on his way out at approximately 5:00 p.m.; the fire department was called around 5:15 p.m. that day.[45]

c) An owner of the property formerly rented by Affordable Marine found a Garmin GPS map system in the main building on the property after the lease expired.[46]

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[43] *Id.* at 1293 (quoting *Maxfield v. Jennings (In re Jennings),* 670 F.3d 1329, 1334 (11th Cir. 2012)).
[44] *Affidavit of Kenneth L. Arnold in support of Plaintiff's Motion for Summary Judgment*, ECF No. 102-1.
[45] *Excerpt from Mr. Phillips' deposition taken January 19, 2018*, ECF No. 102-2.
[46] *Affidavit In Support of Motion for Summary Judgment,* ECF 102-6.

d) Plaintiff was not allowed to see the Vessel the day of but before the fire because the business was "closing up" and the workers wanted to go home; he took pictures of the Vessel the day after the fire.[47]

In his Memorandum, Plaintiff asserts that Phillips' phone records show that "while the boat was burning, Mr. Phillips was on the phone with the insurance company."[48] First, even if that were true, it does not amount to proof that Phillips set the fire. Second, the phone records attached to Plaintiff's Memorandum do not definitively show that Phillips was on the phone with an insurance company while the Vessel was burning. Those records show only three calls to or from the insurance company's number: (1) a one-minute incoming call four days before the fire; (2) a two-minute outgoing call approximately three (3) hours before the fire; and (3) a three-minute incoming call ten (10) minutes before the fire department received the first call about the fire.[49]

As additional "proof" that Phillips set the fire that destroyed the Vessel, Plaintiff filed an Affidavit of Mr. Daniel H. Cole, whom Plaintiff has listed as an expert witness.[50] Mr. Cole's affidavit testimony is

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[47] *Excerpt of deposition of Plaintiff, Ken Arnold, taken January 19, 2018*, ECF No. 102-7.
[48] ECF No. 102, p. 11. For purposes of this Order the Court accepts Plaintiff's characterization that the phone records are authentic. ECF No. 102-3 (comprising pages 10–30 of Verizon Invoice Number 7385674966). Plaintiff directs the Court to calls related to 850-477-7044. ECF No. 102, p. 7.
[49] ECF No. 102-3, p. 1.
[50] Daniel Cole represents himself as a certified Marine Surveyor with the National

problematic for multiple reasons. First, Plaintiff has provided no CV or other documentation to show that Mr. Cole may be qualified as an expert.[51] Second, Mr. Cole's Affidavit contains mere speculation as to the cause of the fire. Third, Mr. Cole does not say when he inspected the burnt remains of the Vessel. It is possible such inspection was in 2020, more than four (4) years after the fire.[52] Mr. Cole's affidavit testimony begins as that of an arson inspector: based on facts. It then morphs into that of a psychic: based on conjecture and no supporting facts, Mr. Cole declares "the fire that destroyed the Vessel was intentional and not an accident."[53]

Courts have held that to defeat summary judgment, expert affidavits must be based upon specific facts and cannot involve "mere speculation or idiosyncratic opinion"[54] or "conclusory allegations."[55] Mr.

Association of Marine Surveyors and a member of the International Association of Arson Investigators. He inspected the remains of the Vessel on an undisclosed date.

[51] *See* Fed. R. Evid. 702.

[52] Another witness Affidavit submitted by Plaintiff, that of Richard Landquist, reflects that Mr. Landquist performed his inspection of the premises where the Vessel is located after the Affordable Marine lease expired in September of 2020. ECF No. 102-6, p. 1.

[53] *Affidavit in Support of Motion for Summary Judgment dated September 20, 2020*, ECF No. 102-4, ¶ 9. Mr. Cole also testifies that the physical burn marks "suggest the use of accelerants." But Mr. Cole does not declare with certainty that the fire was caused by accelerants, and he does not name Phillips or any other individual allegedly responsible for setting the fire. *Id.* ¶ 10.

[54] *In re Agent Orange Prod. Liah. Litig.*, 818 F.2d 187, 193 (2d Cir. 1987), *cert. denied,* 487 U.S. 1234 (1988); *Evers v. General Motors Corp.,* 770 F.2d 984, 986 (11th Cir. 1985); *Estate of Detwiler v. Offenhecher*, 728 F. Supp. 103, 140 (S.D.N.Y. 1989).

[55] *United States v. Stein,* 881 F.3d 853, 857 (11th Cir. 2018) (citing *Lujan v. Nat'l Wildlife*

Cole's Affidavit is rife with mere speculation, idiosyncratic opinion and conclusory allegations.

In *Armstrong v. Oslin* the bankruptcy court was faced with a § 523(a)(6) action based on a $23 million state court judgment against an owner of a bar that had served alcohol to a minor; the minor then drove while intoxicated and severely injured a passenger in another vehicle.[56] The state court held the owner of the bar vicariously liable for the actions of one of the bar's employees.[57] Post-judgment, the bar's owner filed bankruptcy. The injured party's representative filed suit seeking to hold the $23 million personal injury judgment nondischargeable against the bar owner-debtor.[58] The bankruptcy court granted the bar owner-debtor's motion to dismiss the § 523(a)(6) action on the basis that no evidence showed that the bar owner had served alcohol to the minor:

> The first obstacle for [the plaintiff] is the undisputed fact that [the debtor] did not serve liquor to the minor. [The debtor] was not even present when the act that led to the minor's intoxication, which led to the minor's failure to heed a red light, which led to [the] injuries, occurred.
> . . .
> Section 523(a)(6) is founded on the . . . notion that only a debt resulting from the deliberate acts *of the debtor* can be

Fed'n, 497 U.S. 871, 888 (1990)).
[56] *Oslin*, 584 B.R. at 367.
[57] *Id.*
[58] *Id.* at 367–68.

excepted from discharge in bankruptcy.[59]

Just as the plaintiff in *Oslin* had no proof that the bar owner served liquor to the minor, Plaintiff here has not provided one piece of evidence sufficient to prove his current theory that Phillips set the Vessel on fire.

In Count II of the Amended Complaint and again in his Memorandum, Plaintiff alleges that "it is believed" that Phillips intentionally set fire to the Vessel.[60] A belief without facts is not enough on which to conduct a three-day trial. Plaintiff has still not presented one scintilla of evidence to prove an essential element of a § 523(a)(6) action: that the debt is for willful and malicious injury *by the debtor* to another entity or the property of another entity. On that, the Court's opinion has not changed since December of 2020.[61] Without any such evidence, Plaintiff's § 523(a)(6) action, contained in Count II of the Amended Complaint, must fail.

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[59] *Id.* at 372–73 (emphasis added) (citing and quoting *Thatcher v. Austin (In re Austin),* 36 B.R. 306 (Bankr. M.D. Tenn. 1984) (holding that because defendant, concert promoter, did not personally serve the beer that ultimately caused injury, he "did not commit any deliberate act . . . .")); *see also Loucks v. Smith (In re Smith)*, 537 B.R. 1 (Bankr. M.D. Ala. 2015); *Columbia Farms Distr., Inc. v. Maltais (In re Maltais*), 202 B.R. 807 (Bankr. D. Mass. 1996); *Giuliano v. Albano (In re Albano)*, 143 B.R. 323 (Bankr. D. Conn. 1992).

[60] ECF No. 3, ¶ 13; ECF No. 102, ¶4. l. (under the heading "Plaintiff's intended proof at trial".)

[61] *Order Denying Plaintiff's Motion for Partial Summary Judgment on Issue of Non-Dischargeability as to Jeffrey Dale Phillips*, ECF No. 81, p. 6–8, entered on ("In short, not one scintilla of evidence proves the most vital material fact: that the Debtor, Mr. Phillips, set the fire. Plaintiff's belief or conclusion that he did is not enough.").

IV. CONCLUSION

The Court has had significant concerns about this adversary proceeding from its inception. Those concerns escalated when Plaintiff's Memorandum triggered this Court to review the complaint Plaintiff filed in the state court, which is based exclusively on negligence and contains not a word about Phillips intentionally setting the fire.

Plaintiff's new theory of the same facts–that the fire was the result of Phillips' willful and malicious behavior and not negligence–is barred by *res judicata* and collateral estoppel.

Even if Plaintiff is not precluded from pursuing his current theory that Phillips willfully set fire to the Vessel, Plaintiff has presented no evidence sufficient to prove this theory. For the reasons stated,

It is ORDERED:

1. Within fourteen (14) days from the date of this Order, Plaintiff must show cause in writing why summary judgment should not be entered in favor of Defendant, Phillips, on Count II of the Amended Complaint.
2. Plaintiff must also provide, or at minimum proffer, any additional evidence he intends to present at trial in support of the theory that Phillips set or willfully caused the fire.

3. After receipt of Plaintiff's filings in response to this Show Cause Order, the Court will either schedule a trial by separate order or issue a final ruling on summary judgment as to Count II of the Amended Complaint.
4. In his response to this Show Cause Order, Plaintiff shall advise whether he intends to present evidence in support of Count III of the Amended Complaint at trial and, if so, how much time Plaintiff requests for trial on Count III.
5. The status hearing currently scheduled for June 29, 2021, is CANCELED.

DONE and ORDERED on June 28, 2021.

KAREN K. SPECIE
Chief U.S. Bankruptcy Judge

cc: all interested parties including:
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Christina Lee Phillips
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and

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